(9)

No. 05-502

In The Supreme Court of the United States

BRIGHAM CITY,

Petitioner,

v.

CHARLES W. STUART, SHAYNE R. TAYLOR AND SANDRA TAYLOR,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Utah

BRIEF OF *AMICUS CURIAE*, FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case involves the application of the exigent circumstances exception to Fourth Amendment's warrant requirement.

The question presented is whether a police officer's entry into a home was proper pursuant to an exigent circumstances exception, when the officer: has probable cause to believe a crime is being committed; personally witnesses a physical altercation between four (4) adults and one (1) minor inside the home, which altercation occurs at 3:00 o'clock in the morning; personally witnesses the physical assault and injury and of one of the assailants; heard shouts to "Oh Stop!" and "Get off me," when the actions witnessed by the officer occurred inside the home, and were seen through two (2) windows and an open screen door, prior to the officer's entry?

The National Fraternal Order of Police respectfully submits the actions of the officer were reasonable, based on the exigent circumstances exception to the Fourth Amendment's warrant requirement.

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BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE

Now comes the Fraternal Order of Police, on behalf of the more than 322,000 member law enforcement personnel nationwide, by and through undersigned counsel, and hereby respectfully submits its Brief in support of Brigham City, urging reversal of the judgment of the Utah Supreme Court in the above-captioned case.

INTEREST OF *AMICUS*[1]

With this Brief, the National Fraternal Order of Police ("FOP") presents the views of its more than 322,000 law enforcement members and the potential implications for officers, law enforcement and the citizens they protect that will result from the decision rendered by the Utah Supreme Court. This Brief will focus on: (1) exigent circumstances based on probable cause and the strong objective basis to believe that the victim of a physical assault required immediate assistance; (2) the use of this case to establish a workable standard for law enforcement handling exigent circumstances. The FOP adopts and incorporates by reference the Statement and Arguments made within the brief filed on behalf of Petitioners, Brigham City, Utah.

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[1] The submission of this Brief was consented to by all parties hereto.

The office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contribution to the preparation or submission of this Brief.

I. INTRODUCTION

A. The National Fraternal Order of Police – More than 322,000 Men and Women of Law Enforcement Urging Reversal of the Decision of the Utah Supreme Court

The National Fraternal Order of Police represents more than 322,000 law enforcement personnel at every level of crime prevention and investigation, nationwide and internationally. Significant confusion with the work of law enforcement personnel, and a threat to the very lives of the people they are sworn "To Protect and Serve," is squarely presented in this case. The decision of the Utah Supreme Court and the application of its rationale in the field will result in jeopardized safety of United States citizens and a lack of uniformity in enforcement for police.

The National Fraternal Order of Police was founded in 1915. What was originally contemplated as an organization for the "social welfare of all the police" has evolved into an active representative group working to protect and secure the laws and work of it's law enforcement members. The work of the FOP's law enforcement members has long been understood as a significant task:

> The duties which the police officer owes to the state are of the most exacting nature. No one is compelled to choose the profession of a police officer, but having chosen it he is obliged to perform those duties, and to live up to the standards of its requirements. * * * The police officer has chosen a profession that he must hold at all peril. He is the outpost of civilization. He cannot depart from

> it until he is relieved. A great and honorable duty is his, to be greatly and honorably fulfilled.[2]

There is no group more qualified to speak to the issues presented in this case than the National FOP. The FOP perspective on this issue is unique, and particularly appropriate to the substantive law enforcement issues raised within this case. Law enforcement personnel nationwide, and at an international level, work every day to promote and ensure the safety of people everywhere. It is America's law enforcement personnel that patrol the streets, protect people and their families, investigate crime, and arrest criminals. As part of these tasks, law enforcement personnel are engaged in many different experiences. They train to handle these experiences and to quickly and effectively assess risks to citizens, while carrying out their law enforcement assignments. So, too are law enforcement personnel called upon to balance constitutional rights with real and potential risks or threat of such risks. The decision of the Utah Supreme Court precludes law enforcement intervention to protect potential victims of violent crime(s) and will thwart each and every law enforcement effort listed above.

It is with these interests in mind that the FOP and its membership respectfully request this honorable Court reverse the decision of the Utah Supreme Court and find the law enforcement actions objectively reasonable in light of the exigent circumstances presented.

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[2] "The Fraternal Order of Police, A History," Justin E. Walsh, Ph.D.; Turner Publishing Co., Ed. 2001, citing Vernon Smith, Fraternal Order of Police Journal, Vol. 47, No. 1 (Winter, 1964), p.19.

B. Key Facts[3]

It was three o'clock in the morning. Having received a call for noise disturbance, Officer Johnson approached the home. Jt. App. 30. "Oh Stop!" "Stop!" The officers heard shouts within the house. *Id.* They next heard "get off me!" Then scuffling and raucous noises were heard from within the house. *Id.* at 28.

On the front porch the officers saw a beer bottle. They proceeded around the side of the house, following the shouts and noises from what appeared to be the rear of the house. *Id.* at 36.

Looking into an open air backyard porch, the officers saw two (2) minors drinking beer. *Id.* at 37. **With probable cause to believe a crime was being committed,** the officers entered the backyard.[4] From the backyard the officers were able to see into the house through two (2) windows and an open screen door to view the following:

- Four (4) adult persons, physically restraining one (1) minor.
- The minor's fists were clenched. He struggled.
- The minor got one hand free. The minor got in a punch to the face of one of the adult assailants.

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[3] All facts are taken directly from the undisputed sworn testimony of Brigham City Officer Jeff Johnson, from the Trial Court's Hearing on Motion to Suppress. The hearing transcript appears in the Joint Appendix 19-95.

[4] The Trial Court found probable cause to believe a crime was being committed (underage drinking). Jt. App. 91-93.

- The dispute seemed to escalate.

Id. at 38-40.

At this point, the Brigham City officers entered the kitchen and announced themselves as police. *Id.* at 40. The officers immediately separated the parties and restrained the minor. *Id.* at 41-42. The officers testified that throughout the incident, obscenities were being used by the parties. *Id.* at 42.

Officer Johnson testified, "there was somebody involved in a fight in that home and we felt like we needed to go in and make sure that somebody wasn't being assaulted, killed, molested, . . . " *Id.* at 36.

The intervention on the part of these officers **was reasonable** in light of the physical violence witnessed and the actual physical injury which occurred to one of the assailants. Moreover, the shouts to "Stop!" and "Get off me!" provide additional objectively reasonable basis to believe that the violent physical contact was unwanted by at least one of the participants to the altercation.

II. ARGUMENTS IN SUPPORT OF PETITIONER

A. This Case Is An Opportunity To Uphold Reasonable Law Enforcement Action and Establish A Workable Standard For Law Enforcement

The Fourth Amendment to the United States Constitution serves to protect citizens from unreasonable searches and seizures. U.S. Const., Amend. IV. See also, *Texas v. Brown*, 460 U.S. 730 (1983). The constitutional standard for law enforcement is a warrant for search and/or arrest, based on probable cause to believe a crime has been committed. *Id.*

This Court has recognized exceptions to the warrant requirement such as the plain view doctrines,[5] the exigent circumstance doctrine,[6] and the warrantless arrest of an individual who commits a misdemeanor in an officer's presence.[7]

At issue in this case, is the Brigham City officer's determination that exigent circumstances existed, so as to enter the home and curtail continued physical violence.

Exigent circumstances are characterized as "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." See, *Mincey v. Arizona,* 437 U.S. 385 (1978). See also, *United States v. Place,* 462 U.S. 696 (1983). See also, *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

If any set of facts were able to establish a line between the Fourth Amendment's protections of civil liberties and

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[5] As discussed by this Court in *Illinois v. Andreas*, 436 U.S. 765 (1983), "The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first hand, its owner may retain incidents of title and possession, but not privacy." *Id.* at 771.

[6] *Illinois v. MacArthur*, 531 U.S. 326 (2001).

[7] *See, Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) Held. The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense such as seatbelt violation punishable only by a fine. *See also, Maryland v. Joseph Jermaine Pringle*, 540 U.S. 366.

an objectively reasonable basis for law enforcement intervention based on exigent circumstances, this is it.

This case exhibits the appropriate facts to develop a workable standard for law enforcement to use and determine when it is permissible to intervene under the exigent circumstances exception.

In *Illinois v. Andreas*, *supra*, at 772-774, this Court discussed the rationale for "fashioning a standard" for exceptions to the warrant requirement while still being "mindful of three Fourth Amendment principles." As discussed, the standard should be: (1) workable for application by rank and file police officers; (2) reasonable; and (3) objective. *Id.*

Of course, the applicability of this workable standard would necessarily be based on the facts of each case.

This case has physical violence and shouts and cries for help (which indicate noncompliance on the part of a participant). The officers *actually witnessed an assault* between the participants to the altercation, which resulted in *actual physical injury*. These are objective criteria upon which the reasonableness of the officer's actions should be evaluated. *It is unreasonable to suggest that a police officer should not come to the aid of a minor under these circumstances.*

With undisputed probable cause to enter the open air backyard and porch, and an affirmative confirmation that alcohol was involved, the officer's intervention into this altercation at 3:00 a.m., between adults and one minor was reasonable. Furthermore, the police action was limited to only that action which was necessary to "de-escalate" the circumstances.

This is exactly the way reasonable people want police to handle disputes involving physical violence. This case presents the opportunity to draw a definitive and objectively reasonable basis upon which law enforcement will proceed in a warrantless entry. The threat of violence and the actual injury were real.

When considering how and where to draw such lines to create this workable standard for law enforcement, we must look beyond the narrow facts of existing case law and consider the everyday circumstances that law enforcement handles everyday. There is a "gap" between the facts of existing caselaw on this subject. The "gap" is wide and varied in its facts.

Consider everyday altercations, like the one here. Where should law enforcement draw a line of objectively reasonable facts, so as to permit the use of an exigent circumstances exception?

How much fighting is enough?

How much violence is enough to permit law enforcement to intervene without a warrant?

How "escalated" does a situation have to be, in order to find a police officer's intervention reasonable?

What signs should law enforcement wait for prior to entering without a warrant? Should they wait to see a gun? Should they wait to see a baseball bat? Should they wait to see a knife (the altercation in question occurred in the kitchen of the residence)? Should they wait until the weapon is *used*? Should they wait for the multiple assailants or multiple blows between the adults and a minor?

In this case, the officers heard: "Oh Stop!" and "Get off me!" Are shouts and cries enough? Should the police have waited for shrills or other screams? A gunshot? Here, the officers heard thuds and raucous noises coming from the house. Should they have waited for something to break?

We know from case law cited by the Respondents that an attempted suicide is sufficient grounds for warrantless entry. See *Turner v. State*, 645 So.2d 444 (Fla. 1994). We know that a missing home resident is sufficient grounds for warrantless entry. See *United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979). We also know that knowledge of a shotgun wound justifies a warrantless entry. See *United States v. Goldstein*, 456 F.2d 1006 (8th Cir. 1972).

The question remains, what circumstances are enough (shy of an actual gunshot wound or attempted suicide) to form a sufficient basis for warrantless entry? And how, within this "gap" of circumstances, can the workable standard be developed to guide law enforcement?

This case presents the framework for such a standard and good facts to set good precedent. This case has the actual objective criteria, any 1, 2 or 3 of which facts would reasonably lead an officer to believe that exigent circumstances existed.

It is the role of men and women of law enforcement to protect and serve citizens. Who would they be serving by standing idly by while a minor is assaulted by four (4) adults? Who is the court really protecting by upholding a decision which binds officers into a position of having to allow a physical assault to escalate, and until what point? Where is the manual describing an average domestic physical assault?

The answer to each of these questions is *none*. No one is protected, no one is served, and no two incidents of domestic violence are exactly the same. With overwhelming statistics as to the number and scale of violence involved with domestic violence abuse, the role of police officers is critical.

The undisputed testimony offered by Brigham City Officer Johnson illustrates the range of actual circumstances that occur on any given day in law enforcement. Specifically, Officer Johnson testified he was not sure if the minor was being *assaulted, molested* or *raped*. See Jt. App. at 36.

We look to the judicial system, as arbiters of these cases, to balance the interests and draw lines. The Utah Supreme Court has drawn a line that would chill officers' responses to crisis and/or the need for emergency aid.

This case presents an opportunity, with simple facts and objective criteria, to draw a line that would aid law enforcement and protect citizens.

B. The Statistics and Level of Brutality Among Domestic Violence Crimes Requiring Police Intervention.

Unfortunately, in today's day and age, most people do not consider the everyday risks to minors until they see it on an NBC Dateline television program which airs to expose such risks. We do not always hear about everyday violence unless an assailant flees the country after his wife and young child are found dead. As a society are we willing to wait to the point where intervention is not even possible?

The men and women of law enforcement are on the front lines of these disputes. They see, first hand, the disputes behind the statistics. They investigate the altercations that escalate into physical violence and injury.

We know from overwhelming statistics that domestic violence is a growing problem in America:

(1) Every state allows its police to arrest perpetrators of misdemeanor domestic violence incidents upon probable cause, and more than half of the states and the District of Columbia have laws requiring police to arrest on probable cause for at least some domestic violence crimes.[8]

(2) Less than one-seventh of all domestic assaults come to the attention of the police.[9]

(3) Female victims of domestic violence are 6 times less likely to report crime to law enforcement as female victims of stranger violence.[10]

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[8] Zorza, *Mandatory Arrest for Domestic Violence: Why it may prove the best first step in curbing repeat abuse*, Criminal Justice, Vol. 10, No. 3, p.66 (Fall 1995), as stated in American Bar Association Commission on Domestic Violence Statistics, http //www.abanet.org/domviol/stats.html

[9] Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p.3, as stated in American Bar Association Commission on Domestic Violence Statistics, http://www.abanet.org/domviol/stats.html.

[10] American Psychl. Ass'n Violence and the Family: *Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996), p.10, as stated in American Bar Association Commission on Domestic Violence Statistics, http://www.abanet.org/domviol/stats html.

(4) In 1994, 38% of domestic homicides were multiple-victim, usually combining a spouse homicide and suicide, or child homicide.[11]

(5) Where there are multiple victims in a domestic homicide, 89% of perpetrators are male.[12]

These statistics affirm the objective basis for law enforcement to take these circumstances seriously. They affirm the potential risks that law enforcement officers must discern and handle on a daily basis.

C. Case Law With Regard to Warrantless Search and Seizures Supports These Officers.

The National FOP urges this Honourable Court to consider the context of this case with other Fourth Amendment precedent, and reconcile the purpose and standards for use by law enforcement. If an officer can make warrantless arrest for misdemeanors pursuant to *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and search/seize items in plain view pursuant to *Illinois v. Andreas*, 436 U.S. 765 (1983), how can it logically be said, in this case, that an officer can have probable cause, personally witness an assault of a minor through open windows and doors,

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[11] Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p 45, table 12, as stated in American Bar Association Commission on Domestic Violence Statistics, http://www.abanet.org/domviol/stats.html.

[12] Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, p.52, table 29, as stated in American Bar Association Commission on Domestic Violence Statistics, http://www.abanet.org/domviol/stats.html.

personally witness actual injury, and yet no exigent circumstances exist?

D. The Decision of the Utah Supreme Court Set a Dangerous Precedent for Law Enforcement and the Citizens They Serve to Protect.

It defies common sense to understand why the Utah Supreme Court has ruled against law enforcement and the protection of citizens. Certainly such a position is contrary to our public conscience. Should we really allow four (4) adults to assault one (1) minor, at 3:00 o'clock in the morning, when alcohol and underage drinking is present? Should we tell officers who witnessed the alcohol and 3:00 a.m. assault to merely stand by and "see if the circumstances escalate further"?

The Utah Supreme Court's decision was unbalanced. The Utah Supreme Court immediately took the position that a firm line was drawn "at the entrance to the house." *Brigham City v. Stuart, et al.*, 122 P.3d 506, 511 (2005), citing *Kyllo v. U.S.*, 533 U.S. 27 (2001). Citing *Payton v. New York*, the Utah Supreme Court then noted that an officer "who barely cracks open the front door and sees nothing" is deemed to have violated the Fourth Amendment. *Id.* at 511, citing *Payton v. New York*, 445 U.S. 573 (1980). The Utah Supreme Court went further to narrowly describe exigent circumstances in terms of assessing only "the needs of law enforcement" rather than the actual circumstances that require officer aid. *Id.* at 511 citing *Mincey, supra* at 394.

This analysis by the Utah Supreme Court is without balance and renders the "test" for exigent circumstances

meaningless. The Utah Supreme Court chose to narrowly focus on "law enforcement needs" rather than the emergency circumstances that existed for the potential victim(s). This is not a law enforcement driven item, this is about protecting the citizens in need. That balancing of interests was not properly or fairly conducted by the Utah Courts.

As stated above, this case does not present the intricacies or details of a long standing law enforcement investigation into an alleged crime. There is no interest of law enforcement to arrest or seize anyone in the home. Rather, the interest of law enforcement here was merely to aid the participants to the altercation and de-escalate the circumstance. This case presents facts which are more common and more clear as to specific details available to law enforcement in practical application.

The minor in this case needed assistance. A physical altercation ensued. Those are the driving facts behind the acts of law enforcement in this case. *This was the proper action for law enforcement in addressing such disputes.*

The Utah Supreme Court decision seems to exist *in absentia* of everyday brutalities of domestic violence. The decision is focused on the misguided premise that it was law enforcement who needed to enter the house, when in fact it was the victims who needed law enforcement assistance. Taken to the extreme, the Utah Supreme Court's decision may preclude law enforcement from intervening on a potential rape or molestation of a minor by an adult (as was possible in this case).

In a similar manner, the Petitioner draws a line that places potential victims at greater risk before law enforcement can intervene to assist them.

Today, gangs and senseless violence are more the norm, than the extreme. The Respondents' suggested "boundaries" for law enforcement intervention place more people directly at risk. The Respondents cite *Turner, supra, Presler, supra* and *Goldstein, supra*, to set the bar at law enforcement intervention at suicide and actual gunshot wounds. The Respondent's premise that a victim must be missing or suffering a known gunshot to require police assistance is contrary to the current and everyday dangers that citizens face and which citizens expect for police assistance.

The Respondents' position falls short of addressing the everyday circumstances faced by law enforcement officers when protecting citizens. Their position fails to address the "gap" of circumstances between actual gunshot wounds and a common physical assault. Moreover, the position is tenuous and difficult to defend for a law enforcement officer who sits idly by. The Respondents suggest that courts should allow the law to be stretched to its logical and/or legal extreme. Such a position does not adequately protect victims and further, does not establish a uniform and rational basis for law enforcement to carry out their duties.

CONCLUSION

This Brief In Support is intended to provide the Court with the practical context and consequences of the Utah Supreme Court's decision and finding of no exigent circumstances, the result of which will have a significant impact on the work and efforts of law enforcement personnel to protect our citizens.

This case presents simple undisputed facts, and an opportunity for the Court to establish a reasonable standard/basis for law enforcement to protect citizens where probable cause exists, and plain view of misdemeanor assaults, with actual physical violence and injury resulting.

Based on the foregoing, the National Fraternal Order of Police respectfully requests this Court reverse the Utah Supreme Court, and find that exigent circumstances did exist as did an objective reasonable basis, so as to uphold the officer's entry into the residence, in this matter.

Respectfully submitted,

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